

SERVICE DATE – AUGUST 9, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36157

CITY AND COUNTY OF DENVER—ACQUISITION EXEMPTION—WESTERN STOCK
SHOW ASSOCIATION IN THE CITY AND COUNTY OF DENVER, COLO.

Digest:¹ The Board finds that the City and County of Denver failed to show that it did not acquire a common carrier obligation from the Western Stock Show Association when it bought the real property underlying approximately 1.2 miles of railroad in the Denver Stockyards. Accordingly, the Board denies the City and County of Denver's motion to dismiss its notice of exemption.

Decided: August 8, 2018

On November 28, 2017, the City and County of Denver, Colo. (the City), a political subdivision of the State of Colorado, simultaneously filed a verified notice of exemption to acquire from the Western Stock Show Association (WSSA) the real property underlying two corridors of rail line in the Denver Stockyards, and a motion to dismiss the notice. The two corridors total approximately 1.2 miles and consist of (1) the National Western Drive Corridor (NWD Corridor), which is adjacent to National Western Drive, from the south right-of-way line of East 47th Avenue, extending northeast and then north to the northeastern right-of-way line of Race Court, and (2) the River Corridor, which is adjacent to the east bank of the South Platte River, from the intersection with the NWD Corridor at a point just north of that corridor's southern endpoint, extending north and then northeast to an intersection with the NWD Corridor just south of Race Court (the Lines). The notice became effective on December 28, 2017. On March 23, 2018, the Board requested supplemental information from the parties to enable it to determine whether the transaction should be dismissed. In its April 23, 2018 supplement, the City states that it and WSSA consummated the real property transactions described in the notice. (City Suppl. 2.)

The basis of the City's motion to dismiss the notice of exemption is its claim that the acquisition transaction was not subject to the Board's regulatory authority under 49 U.S.C. § 10901, because it did not result in the transfer of common carrier obligations, or the transfer of any rights or obligations that would prevent the current operator, the Denver Rock Island

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Railroad (DRIR), a Class III rail carrier, from fulfilling its common carrier obligations on the Lines. (Mot. 3, 9.)

The Board finds that the City has failed to meet its burden of showing that § 10901 does not apply to the transaction. The Board concludes that WSSA held a common carrier obligation to provide service over the Lines and that the obligation was transferred to the City upon consummation of the transaction. Further, the Board finds that the terms of the easement governing operations could allow the City or WSSA (whose common carrier obligation the City obtained) to unduly interfere with the provision of freight rail service over the Lines. Accordingly, the Board will deny the motion to dismiss.

BACKGROUND

WSSA's predecessor in interest, the Denver Union Stockyard Company, developed the Denver Stockyards over 100 years ago. (Mot. 3.) Development included building an extensive network of tracks on the property, over which operating rights were granted to various railroads. (*Id.*) The Denver Stockyards grew through the 1960s, when they housed livestock holding pens, processing plants, and related businesses, many of which were served by rail. (*Id.*) However, since the 1970s, many of the buildings and associated tracks have been demolished and other industries have occupied parts of the site. (*Id.* at 3-4.) The Denver Coliseum is located in the complex and remains a venue for the National Western Stock Show and Rodeo (Stock Show), which began in 1906. (*Id.* at 4; Notice Attach. 3 at 53.) The complex hosts over 250 events annually. (Mot. 4.)

In a series of transactions beginning in 1989, WSSA acquired the Lines, among other property, and simultaneously leased and licensed certain rail property to the Denver Terminal Railroad Company (DTRC), a predecessor to DRIR, and other operators. See W. Stock Show Ass'n—Aban. Exemption—in Denver, Colo., 1 S.T.B. 113, 114-15, 144-45 (1996) (explaining the then-current ownership of the Lines and summarizing the history of rail operations in the Denver Stockyards). DRIR is currently authorized to provide common carrier transportation over the Lines pursuant to a 1993 decision by the Board's predecessor, the Interstate Commerce Commission (ICC). See Denver Terminal R.R.—Aquis. & Operation Exemption—Denver Ry., FD 32356 (ICC served Sept. 29, 1993) (granting operating authority to DTRC).

In 1995, WSSA filed three adverse discontinuance applications asking the ICC to find that the public convenience and necessity required or permitted the discontinuance of service by DTRC, as well as by Burlington Northern Railroad Company (BN, a predecessor to BNSF Railway Company (BNSF)), and Union Pacific Railroad Company (UP), both of which apparently had trackage rights over the Lines. See W. Stock Show Ass'n, 1 S.T.B. at 113-14, 139. It simultaneously filed a petition for exemption to permit it to abandon the Lines. *Id.* The ICC denied the adverse discontinuance applications of DTRC's operating authority over the Lines and BN's trackage rights over the River Corridor. *Id.* at 141-42. It also denied WSSA's abandonment petition (thereby preserving WSSA's common carrier obligation). *Id.* at 141. The ICC granted the discontinuances of BN's trackage rights over a portion of the NWD Corridor and UP's trackage rights. *Id.* at 141-42. However, according to the City and DRIR, neither

railroad consummated the discontinuances that were granted, and both still hold trackage rights over the Lines. (City Suppl. 5-6; DRIR Comment 5, April 23, 2018.)

Following a series of disputes before the ICC and federal courts, WSSA and DRIR came to an agreement in 1997, whereby WSSA (1) retained ownership of the real property underlying the Lines; (2) sold to DRIR the rail, ties, ballast, spikes, tie plates, bolts, and angle irons (collectively, the Tracks); and (3) granted to DRIR a non-exclusive easement to operate over the Lines. (Mot. 3; Notice 2-3.) Although DRIR has been the only freight operator on the Lines for two decades, historically a number of railroads have operated on the Denver Stockyards, including the predecessors of UP and BNSF. (Notice 2 n.1, Mot. 7 n.2.) The City states that the non-exclusivity of the easement may have been intended to avoid inadvertently interfering with any established, but not actively exercised, common carrier rights. (City Suppl. 6.)

The 1997 easement also provides that WSSA shall have the full right and authority to grant other easements or rights to use the Lines that will not impair DRIR's rights under the agreement. (Notice, Attach. 2 at 3.) It reserves for WSSA the right to cross over and through the easement to access the National Western Complex at any place and for any purpose as long as the crossing does not unreasonably interfere with DRIR's railroad operations. (Id.) To accommodate the Stock Show, the easement provides that "[f]or a period of approximately 16 days in January of each year . . . no rail operations will be conducted on weekends or holidays." (Notice, Attach. 2, App. 4 at 1-2.) It also restricts DRIR's use during the month of January, and "at such other times as WSSA shall notify DRIR of WSSA's need to cross [the Tracks] . . . for access to and from WSSA's National Western Complex," to certain times of day and specific types of operations. (Id. at App. 4 to Attachment 2 at 1.)

The easement also states that DRIR's rights shall terminate on the effective date of a Board order authorizing DRIR to discontinue service over the Lines. (Notice, Attach. 2 at 6.) The bill of sale for the non-real property physical assets of the Lines is incorporated by reference into the easement, which imposes the following additional conditions on the easement:

[WSSA] specifically reserves all rights to use the existing tracks . . . to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the [Board], and [DRIR] accepts the Tracks subject to the obligations of other entities to provide common carrier services; and agrees not to remove the Tracks . . . prior to final abandonment authority being obtained from the [Board].

(Notice, Attach. 2, App. 3 at 1.) Finally, the easement allows for certain drywall unloading operations on WSSA's real property adjoining the Tracks but restricts those operations as well as methanol deliveries during the Stock Show and other times. (Notice, Attach. 2, App. 2 at 3; Notice, Attach. 2, App. 4 at 1.)

On November 28, 2017, the City filed a verified notice of exemption to acquire from WSSA the real property underlying the Lines and a motion to dismiss the notice. As noted above, the City consummated that transaction after the exemption became effective in December 2017. The City states that it purchased the Lines as part of a plan to consolidate

ownership and control of 250 acres of property, including the Denver Stockyards, to redevelop the site as the National Western Center, an agricultural innovation, education, event, and tourism center. (Mot. 3, 4.) According to the City, the redevelopment will accommodate “the continued operation of the existing freight rail service through the site,” (Mot. 4),² though the City notes that the redevelopment plans also include the proposed consolidation of rail operations into a single corridor over which DRIR will retain its existing non-exclusive freight easement. (Mot. at 5.) The City states that it will coordinate with DRIR on the design and construction of the facilities. (Id. at 5.)³

On March 23, 2018, the Board’s Acting Director of the Office of Proceedings issued a decision asking the City to provide additional information regarding issues raised by its motion to dismiss. In its supplemental filing, the City asserts that, upon its acquisition of the real property underlying the Lines, it did not acquire any rights or obligations that would prevent the incumbent railroad from fulfilling its freight common carrier obligation over the Lines. It claims that DRIR retained ownership, control, and operation of the physical operating assets of the Lines, and DRIR’s existing easement remains in effect and permits it to continue providing freight service on the Lines. (City Suppl. 5-7.) The City argues that DRIR’s common carrier right to provide freight service will not be affected by the transaction. (Id.)

The City also asserts that it did not acquire any rights or obligations that implicate the freight common carrier operations that may remain with WSSA or that are otherwise attached to the Lines. (City Suppl. 2-5.) It therefore seeks a determination pursuant to Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), and related case law, that the notice of exemption should be dismissed because the City’s acquisition of the real property underlying the Lines was not a transaction subject to the Board’s regulatory authority under 49 U.S.C. § 10901. (Mot. 5-6, City Suppl. 7.)

DISCUSSION AND CONCLUSIONS

The question at issue here is whether the Board’s regulatory authority is required for the City to acquire the real property underlying the Lines. The acquisition of an active rail line, and

² The City states that no rail customers are located within the footprint of the redevelopment site and that DRIR conducts switching operations for shippers located north of the National Western Center site. (Mot. 4.) The City asserts that, because there are no shippers on the redevelopment site, DRIR’s use of the corridor may include overhead movements, car storage, and switching. (Id. at 5.) However, on December 12, 2017, DRIR submitted comments asserting that there are two shippers on the site footprint. (DRIR Comments 4.) The Board need not resolve this dispute to rule on the City’s motion to dismiss.

³ This decision pertains only to the present transaction (the acquisition of real property underlying two lines of railroad) and not to any future plans that the parties may have. As such, this decision should not be construed as approving, or indicating whether Board approval would be required for, any future plans, including the consolidation of track associated with the redevelopment.

the common carrier obligation that goes with it, ordinarily requires Board approval under 49 U.S.C. § 10901, even if the acquiring entity, including a state, is a noncarrier. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is typically not required, however, when the common carrier rights and obligations that attach to the line will not be transferred, the existing carrier will continue to provide common carrier freight service, and that carrier retains sufficient control over the line to carry out its common carrier obligation without undue interference. See State of Maine, 8 I.C.C.2d at 836-37; Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010) aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

In a typical State of Maine transaction, a rail carrier sells the physical assets of the line (including track, ties, ballast, etc.)—often to an entity that will use the line for commuter passenger rail service that is outside the Board's jurisdiction—while retaining an unrestricted, permanent freight rail easement allowing it to provide freight rail service and meet its common carrier obligation. The key question in such a case is whether the transaction documents give the new owner of the physical railroad assets or property the ability to prevent the rail carrier that retains the freight operating easement from meeting its common carrier obligation on the line. Mass. DOT, FD 35312, slip op. at 8. In other words, the rail operator must maintain its common carrier obligation as well as the means—the property right and control over its operations—to carry out its obligation without undue interference. Cent. Puget Sound Reg'l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cty., Wash., FD 35812, slip op. at 3 (STB served Feb. 5, 2015).

Here, the City acquired real property from WSSA to redevelop an industrial area into an agricultural innovation, education, event, and tourism center, and seeks a determination that the transaction was not subject to the Board's regulatory authority. However, as noted in the Board's March 23, 2018 decision seeking supplemental information, there is a question as to whether WSSA was a common carrier and, if so, whether WSSA's common carrier obligation was transferred to the City as a result of the transaction. The March 23 decision specifically pointed to the 1997 easement, which contains a term specifically reserving rights to use the tracks "to satisfy common carrier obligations."

The City argues that there is no evidence in the record that WSSA or its predecessors held a common carrier obligation over the Lines and points to the absence of documentation confirming that WSSA or its predecessors conducted rail operations themselves. (City Suppl. 2-3.) It asserts that the language in the 1997 easement reserving rights to use the Tracks to satisfy common carrier obligations did not specify whether WSSA intended to exercise its own common carrier obligation or permit such exercise by other parties, (City Suppl. 2-3), and concludes that language should be read as a generalized reference to the potential that other railroads may hold common carrier rights. (Id. at 3.)

Contrary to the City's arguments, the more natural reading of the easement is that WSSA reserved its own right to use the Tracks to fulfill its common carrier obligations. Moreover, as

noted above, WSSA filed for authority to abandon the Lines in 1995. See W. Stock Show Ass’n, 1 S.T.B. at 144-45; see also City & Cty. of Denver—Acquis. Exemption—W. Stock Show Ass’n—in the City & Cty. of Denver, Colo., FD 36157, slip op. at 2 (STB served March 23, 2018) (citing W. Stock Show Ass’n, 1 S.T.B. at 113-14). In its 1995 exemption petition, which the ICC denied, WSSA stated that it sought “exemption to permit it to abandon its residual common carrier obligation on [the Lines.]” WSSA Petition 4, Aug. 29, 1995, W. Stock Show Ass’n—Aban. Exemption—in Denver, Colo., AB 452 (Sub-No. 1X). As DRIR argues, WSSA’s abandonment and adverse discontinuance filings in the mid-1990s “are the unmistakable hallmarks of an entity that recognizes that it has a residual common carrier obligation to provide freight service.” (DRIR Comment 5, April 23, 2018). Based on the current record, the Board finds that upon WSSA’s 1989 acquisition of the Lines, it acquired a common carrier obligation to ensure service over the Lines.

The City next argues that even if WSSA held a common carrier obligation, the City would not have acquired such rights because it took title “subject to” existing easements. (City Suppl. 3.) It explains that the easement encumbers the City’s real property interest, and the City steps into WSSA’s shoes only as far as ownership of the real property; otherwise WSSA retains its rights of use and access and DRIR’s operations remain unchanged under the easement. (Id. at 4.) However, the City cannot avoid acquiring a common carrier obligation simply by claiming it did not acquire one. Purchasers of an active line of railroad acquire the common carrier obligation to ensure that service continues to be provided. S. Pac. Transp. Co.—Aban. Exemption—Los Angeles, Cty. Cal., 8 I.C.C.2d 495, 506 (1992) (clarified by S. Pac. Transp. Co., AB 12 (Sub-No. 139X) (ICC served Feb. 25, 1993)). A carrier’s obligation to serve can only be extinguished by the Board. Id. Here, while the City may have intended only to purchase the underlying real estate, it also obtained the same rights and obligations of the previous land owner, WSSA. Accordingly, the City acquired the common carrier obligation previously held by WSSA upon consummation of the acquisition transaction.⁴ See City of Austin, Tex—Acquis.—S. Pac. Transp. Co., FD 30861(A), slip op. at 1 (ICC served Nov. 4, 1986); see also Groome & Associates, Inc. v. Greenville Cty. Econ. Dev. Corp., FD 42087, slip op. at 10 (STB served July 27, 2005).

Finally, the City has not demonstrated that this transaction falls within the typical State of Maine line of precedent. State of Maine envisions that the selling carrier will retain a permanent easement for freight operations over the line and that those freight operations be protected from undue interference by the new owner, usually by agreements between the seller and buyer allowing the carrier control over its own operations, thus ensuring the permanent continuation of common carrier service over the line. See S. Pac. Transp. Co., 8 I.C.C.2d at 505. Here, there does not appear to be an agreement between the City and DRIR or, for that matter, the City and WSSA, establishing operating conditions following the acquisition. Indeed, it appears that there is nothing protecting DRIR from undue interference in the transaction documents. See Wis. Dept. of Transp.—Pet. for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake,

⁴ The City states that it “cannot lawfully conduct freight operations,” (Mot. 7); however, under 49 U.S.C. § 11101(a), a common carrier must provide service upon reasonable request, although it need not provide that service itself.

Barron Cty., Wis., FD 35366, slip op. at 3-4 (STB served Sept. 23, 2010). In fact, there are terms of the easement that appear to give the City (or WSSA) the ability to interfere with DRIR's freight operations. Specifically, the rail operations section of the easement dictates that in "January of each year, and at such other times as WSSA shall notify DRIR of WSSA's need to cross DRIR's rail lines . . . rail operations will be conducted on the lines only during the hours between 10:00 am and 5:00 pm, and between 10:00 pm and 4:00 am" and also includes specific restrictions on drywall operations in each corridor. (Notice, Attach. 2, App. 4 at 1, emphasis added.) The underlined language is open-ended and appears to give WSSA, and possibly the City, substantial ability to restrict DRIR's rail operations without agreement or assent from DRIR. On this record, the Board cannot conclude that DRIR will be able to conduct its rail operations without undue interference from the new owner.

For these reasons, the City's motion to dismiss will be denied. The Board finds that the transaction was not consistent with the State of Maine line of precedent. Because this transaction is therefore not appropriate for dismissal under State of Maine, the City acquired WSSA's common carrier obligation upon consummation of the transaction and is now a common carrier subject to the Board's jurisdiction.

It is ordered:

1. The City's motion to dismiss the verified notice of exemption in this proceeding is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.